LC2003-000293-001 DT

09/21/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:

DEANE NOVAK RONALD K BLAKE

v.

ARIZONA STATE VETERINARY MEDICAL EXAMINING BOARD (001) ARIZONA STATE (001) MARC H HARRIS

OFFICE OF ADMINISTRATIVE HEARINGS

MINUTE ENTRY

Jurisdiction and Standard of Review

This Court has jurisdiction over this case pursuant to A.R.S. § 12-910(e), and this Court is charged with the review of administrative decisions in proceedings in which the State is a party:

The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.¹

This administrative review action has been under advisement since the time of oral argument on July 26, 2004. This decision is made within sixty (60) days as required by Rule 9.9, Maricopa County Superior Court Local Rules of Practice. This Court has considered and

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¹ A.R.S. Section 12-910(e). Docket Code 019

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reviewed the record of the proceedings before the Arizona State Veterinary Medical Examining Board and the excellent memoranda and oral arguments submitted by counsel.

The scope of review of an agency determination under administrative review places the burden upon the Plaintiff to demonstrate that the agency's decision was arbitrary, capricious, or involved an abuse of discretion.² The reviewing court may not substitute its own discretion for that exercised by the agency or Board³, but must only determine if there is any competent evidence to sustain the decision.⁴

Facts

On March 2, 2000, Jill Guittard took her dog to Novak Animal Care Center⁵, which is owned by Plaintiff, Deane Novak, to be euthanized and cremated. Novak Animal Care Center subcontracted with Jeremy Harper (hereinafter "Harper"), a veterinary assistant at Novak Animal Care Center, who independently operated "Forever Friends Cremations," to perform the cremation. Before hiring Harper to perform cremations, Plaintiff stated that he relied on his office manager, Kathy Folkers, to verify the legitimacy of Harper's cremation service. The Board found that Ms. Folkers made a telephone call to a representative of Cerbat Animal Hospital to verify that they had used Harper to perform cremations and had not experienced any problems with his services. Harper's methods of cremating the animals were crude and unprofessional. He would pick up deceased animals from Plaintiff's veterinary clinic and take them to a fire pit area in the desert, and burn them (not all of the animals' carcasses were totally burned) with a weed burning propane torch. Harper would return partial ashes mixed with sand and other debris in the urns.

Ms. Guittard was dissatisfied with the manner in which the cremation was performed and filed a complaint against Plaintiff with the Arizona State Veterinary Medical Examining Board on April 40, 2001. On June 20, 2002 and August 21, 2002, the Board held an informal interview. On August 28, 2002, the Board issued its Findings of Fact, Conclusions of Law and Order. Plaintiff timely filed his Petition for Rehearing, which took place on January 15th, 2003. The board issued its Amended Findings of Fact, Conclusions of Law, and Order on March 3, 2003, finding three instances of unprofessional conduct by Plaintiff:

1. Violation of A.R.S. § 32-2232(3) [misrepresentation of services rendered].

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² <u>Klomp v. Ariz. Dept. of Economic Security</u>, 125 Ariz. 556, 611 P.2d 560 (App. 1980); <u>Sundown Imports, Inc. v. Ariz. Dept. of Transportation</u>, 115 Ariz. 428, 431, 565 P.2d 1289, 1292 (App. 1977).

³ Ariz. Dept. of Economic Security v. Lidback, 26 Ariz. App. 143, 145, 546 P.2d 1152, 1154 (1976).

⁴ Schade v. Arizona State Retirement, 109 Ariz. 396, 398, 510 P.2d 42, 44 (1973); Welsh v. Arizona State Board of Accountancy, 14 Ariz. App. 432 P.2d 201 (1971).

⁵ Located in Lake Havasu City, Arizona.

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- 2. Violation of A.R.S. § 32-2232(12) [violating the ethics of the profession by services rendered].
- 3. Violation of A.R.S. § 32-2232(12) [violating the ethics of the profession by disrespect and inconsiderate treatment to animal owners and their deceased pets].

The order of the Board placed Plaintiff on probation for six months and ordered him to read and submit a summary to the Board of Chapter 2 of *Law and Ethics of the Veterinary Profession*, by James F. Wilson, D.V.M.,J.D. Plaintiff now brings the matter before this court, having timely filed this administrative review action.

Issues Presented for Review

The first issue raised by the plaintiff is his contention that the Board's findings and conclusions are not supported by the evidence. When reviewing the sufficiency of the evidence, a reviewing court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact. All evidence will be viewed in a light most favorable to sustaining a decision and all reasonable inferences will be resolved against the party appealing the decision. If conflicts in evidence exist, the reviewing court must resolve such conflicts in favor of sustaining the decision and against the Plaintiff. When the sufficiency of evidence to support a decision is questioned on review, a reviewing court will examine the record only to determine whether substantial evidence exists to support the action of the administrative agency. The Arizona Supreme Court has explained in a criminal case (*State v. Tison*) that "substantial evidence" means:

More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.¹¹

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⁶ <u>State v. Guerra</u>, 161 Ariz. 289, 778 P.2d 1185 (1989); <u>State v. Mincey</u>, 141 Ariz. 425, 687 P.2d 1180, cert. denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); <u>State v. Brown</u>, 125 Ariz. 160, 608 P.2d 299 (1980); <u>Hollis v. Industrial Commission</u>, 94 Ariz. 113, 382 P.2d 226 (1963).

⁷ <u>State v. Guerra.</u> supra; <u>State v. Tison</u>, 129 Ariz. 546, 633 P.2d 355 (1981), cert. denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).

⁸ State v. Guerra, supra; State v. Girdler, 138 Ariz. 482, 675 P.2d 1301 (1983), cert. denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).

⁹ <u>Hutcherson v. City of Phoenix</u>, 192 Ariz. 51, 961 P.2d 449 (1998); <u>State v. Guerra</u>, supra; <u>State ex rel. Herman v. Schaffer</u>, 110 Ariz. 91, 515 P.2d 593 (1973).

¹⁰ Supra.

¹¹ State v. Tison, at 553, 633 P.2d at 362.

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Plaintiff argues that he did not make representations to clients regarding the manner in which cremations were performed. He did not warn his clients that their pets would be burned by a propane torch over a fire pit in the desert, and that the remains returned to them would contain trash, dirt, and ashes. Plaintiff's clients were led to Harper's services by Plaintiff's express recommendation, a recommendation that clearly implied that the Plaintiff had investigated and approved the method and manner of the services rendered. Cremations by definition are the complete burning of the deceased. A pet owner would reasonably expect that all of the remains are to be cremated and returned to the pet owner. Ms. Guittard did not receive the complete remains of her pet, and received other materials and trash, mixed in with the ashes. Therefore, the cremation was not performed in a proper or professional manner. This Court has reviewed the record and determines that substantial evidence exists to support each of the factual findings made by the Board in this case.

The second issue raised by the Plaintiff is whether or not it is a misrepresentation of services within the meaning of A.R.S. § 32-2232(3), for Plaintiff to inform clients that his office subcontracted to provide cremation services, since (a) the services provided by Harper were cremation services and/or (b) on those occasions where Harper failed to complete the cremations he had subcontracted to provide, Plaintiff did not know that Harper had not completed those cremations. The statute A.R.S. § 32-2232(3) states that unprofessional conduct includes: "misrepresentation of services rendered." The statute does not say that the misrepresentation has to be knowingly or intentionally made. Other subsections of the statute such as subsection (14) use the word "knowingly." This indicates that the legislature purposefully left out the adjective "knowingly" in subsection (3) and intended to require strict compliance. The court cannot construe a statute contrary to the legislature's clear intent. Although the services provided by Harper were cremation services, they did not meet the expected standard of a respectful, thorough and considerate procedure. This is a reasonable standard that does not need to be explicitly stated when offering cremation services. In fact, it appears that the legislative intent was to require veterinarians to investigate and research the services offered by their employees and sub-contractors. This Court has reviewed the record and determines that Plaintiff's actions constitute a misrepresentation of services within the meaning of A.R.S. § 32-2232.

The last two issues raised by Plaintiff are whether he violated A.R.S. §32-2232(12) and R3-11-501(2), and whether disciplinary action can be imposed, when Plaintiff did not fall below the general practice of veterinary medicine. A.R.S. § 32-2232 does not refer to the professional industry standards when considering whether the conduct is unprofessional. R3-11-501(2) refers to professionally acceptable procedures; however, it is in conjunction with considerate treatment, not as an alternative. The cremation services provided by Plaintiff fell below a reasonable standard of considerate treatment. Also, in order to determine and define standards of professional conduct the plaintiff relied on California cases that are not persuasive and lack authority in this jurisdiction. Lastly, as a matter of public policy, the acceptance of the plaintiff's argument would encourage veterinarians to intentionally distance themselves and to remain ignorant of services offered by their offices, rather than conduct proper research into the actions Docket Code 019

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of employees and subcontractors. This Court has reviewed the record and determines that Plaintiff's actions did in fact violate A.R.S. § 32-2232(12) and R3-11-501(2).

Conclusion

This Court must conclude based upon the record that the Board's actions were supported by substantial evidence, the Plaintiff's actions constituted a misrepresentation of services and the Plaintiff did in fact violate ARS § 32-2232(3), A.R.S. § 32-2232(12) and R3-11-501(2).

IT IS THEREFORE ORDERED denying all relief as requested by the Plaintiff in his complaint.

IT IS FURTHER ORDERED affirming the determinations and decisions of the Defendant, Arizona State Veterinary Medical Examining Board.

IT IS FURTHER ORDERED that counsel for the Defendant Board shall lodge an order consistent with this minute entry no later than <u>October 10</u>, 2004.